Supreme Court of the United States

BERTHA B. FOSTER ET AL., PETITIONERS,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

HENRY C. BUESCHER ET AL., PETITIONERS,

VS.

UNITED STATES OF AMERICA, RESPONDENT.

BRIEF AND ARGUMENT OF PETITIONERS, BERTHA B. FOSTER ET AL., AND HENRY C. BUESCHER ET AL.

REFERENCE TO OFFICIAL REPORT.

This case was officially reported in ~~133~~ 131 Federal Reporter, 2nd Series, Page 3.

GROUNDS FOR JURISDICTION OF THIS COURT.

1. The Circuit Court of Appeals decided an important question of Federal Law which has not been, but should be decided by this Honorable Court, to-wit:

That a declaration of taking signed by the Secretary of War pursuant to the provisions of Sec. 258 (a), Title 40, U. S. Code, is inadmissible in evidence as an estimate of a party in interest as to the value of land involved in condemnation proceedings by the government.

2. The Circuit Court of Appeals decided an important question of Iowa Law in a way which is undoubtedly in conflict with applicable local decisions, to-wit:

It held directly in conflict with numerous decisions of the Supreme Court of Iowa that an admission contained in the pleadings namely: the estimated value of the real estate in controversy was inadmissible in evidence.

3. The Circuit Court of Appeals decided an important question of Iowa Law in a manner probably in conflict with applicable Iowa decisions in holding as it did in these cases that cross-examination of witnesses for the condemnor will not be permitted to govern sales of land to the condemning agency even though such sales are voluntary and even where the sole purpose of such cross-examination is to test the qualifications of the witnesses.

4. The Circuit Court of Appeals in its opinion in these cases decided an important question of Iowa Law in a manner probably in conflict with Iowa decisions when it held that the doctrine of induced error has no application to the cases at bar, thereby permitting the government counsel a latitude of cross-examination far greater than that permitted to the petitioner.

5. The Circuit Court of Appeals in its opinion decided an important question of Federal Law in conflict with the decisions of other Circuit Courts of Appeals in holding that the prices voluntarily paid by the government for similar lands in the vicinity at about the time of the condemnation could not be shown in evidence as bearing upon the fair market value of the land in controversy or inquired into on cross-examination in order to test the qualifications of the witnesses.

6. The Circuit Court of Appeals in its opinion decided an important question of Federal Law in a manner in conflict with the Supreme Court of Iowa in respect to the law of that case when it held as it did in these cases that where it had already been shown that the Foster

land was readily accessible to improved highways, railways, waterways and an airport, and where it had already been shown that the land was in fact taken for the purpose of establishing a manufacturing plant and witnesses had testified that it was adaptable for industrial purposes, that nevertheless it was error to permit witnesses for the petitioners Foster to testify as to any increased value of the Foster farm because of its peculiar adaptability as a manufacturing site.

STATEMENT OF THE CASE.

These two proceedings were brought by the United States to condemn certain farm land for the Iowa Ordnance Plant in Des Moines County, Iowa. No. 12312, in the Circuit Court of Appeals, involves the 235 acre farm owned by Bertha B. and W. E. Foster, her husband. No. 12313, in the Circuit Court of Appeals, involves the 172.52 acre farm of Henry C. Buescher. While it was stated in the opinion of the Court below that "It (the Buescher farm) adjoins the Foster tract on the North," the fact is that the Buescher farm lies approximately two and one-half miles south and one mile east of the Foster farm. For the convenience of the Court, we separate the statement of facts.

A.

The Foster Farm.

This suit was brought on January 21, 1941. On the same day the Government filed a declaration of taking and deposited $35,000 which was stated in the declaration to be the amount ascertained by the Secretary of War as just compensation (R. 3). The land is located about six miles west of the city of Burlington and lies one or two miles south of U. S. Highway 34. There is another paved U. S. Highway at the west. Primary Road

No. 3, a paved Highway, is west and south of the farm and U. S. Highway No. 61, another paved Highway is east and south thereof. At Burlington, there is a municipal dock used for transportation of freight on the Mississippi River. At Ft. Madison, there is the Santa Fe Railroad; at Burlington, the Rock Island and C., B. & Q. Railroads. The main line of the latter railroad lies a short distance north of the farm. There is a branch line of the Burlington running from Burlington to St. Louis. A branch line of the Rock Island runs northward to St. Paul (R. 40). The Foster farm is situated so as to be available for manufacturing purposes (R. 41) although its actual use has been limited to agriculture (R. 62 and 43). The trend of industrial expansion in Burlington has been toward the west (R. 44).

Improvements on the farm consisted of a dwelling house of twelve rooms in good repair, although seventy-five years old; two barns, one of which was comparatively new; and other improvements (R. 64). Appellees' witnesses testified to the value of the property as follows: $43,600 (R. 26), $42,300 to $47,000 (R. 28), $47,000 (R. 32), $43,325 (R. 33), or $48,000 or $49,000 if used for manufacturing purposes (R. 45), $43,025 (R. 37) or $48,025 if used for manufacturing purposes (R. 39), $51,000 (R. 47), $50,000 (R. 48). The Government's witnesses estimated the value of the farm at $21,625 (R. 66), and $23,270 (R. 72). It will be noted that, excluding the availability of the land for manufacturing purposes, and considering its value solely as farm land, the average valuation placed on the Foster farm by Appellee's witnesses was $45,906. The jury returned a verdict of $42,000 (R. 23).

The only two witnesses who placed an estimate on the value of the farm for other than agricultural purposes were Henry R. Naumann and E. W. Wischmeier. Mr. Naumann's opinion of the value of the farm as a farm was $43,025 (R. 37), but that, if the adaptability of the land for ordnance purposes were considered, the valua-

tion would be $48,025. Mr. Naumann was a real estate broker in Burlington and president of the Des Moines County Real Estate Board (R. 37). E. W. Wischmeier is a professional trustee and invests trust funds under his control in real estate (R. 33). He valued the property at $43,325 as a farm, but stated that it was available for manufacturing purposes. Considering any and all reasonably adaptable uses, its valuation would be $48,000 or $49,000 (R. 45).

The Government's counsel were the first to cross-examine any witnesses. On nineteen different occasions, they were permitted on cross-examination over the objections of the land-owners to ask the land-owners' witnesses whether they had considered certain sales of nearby land. The questions in each case were so framed that the price per acre was specified (R. 29, 30, 32, 35, 38 and 50).

The land-owners offered in evidence the declaration of taking signed by the Secretary of War showing that he had "ascertained" the value of the land to be $35,000. Although the grounds for the offer were not specified in the record the theory of the offer was that the declaration constituted an admission in the pleadings made by the adverse party, which, under the Iowa law, is admissible. The Government's objection to the offer was overruled (R. 48), and the Court instructed the jury that the statements of the Secretary of War were to be considered "as a statement of one of the parties to the suit as to what he considered an estimation of just compensation" (R. 19 and 20).

In precisely the same manner as the Government's counsel had cross-examined the land-owners' witnesses with respect to sales of other lands, the land-owners' counsel for the purpose of testing the qualifications of the government's witnesses in accordance with the well-established Iowa rule, cross-examined the two Government witnesses with respect to sales of land in the immediate vicinity of the Foster farm which were made to the Government at or near the time of the institution of the con-

demnation proceedings. The record is entirely devoid of any evidence tending to indicate that the sales made to the Government were not voluntary sales.

B.

The Buescher Farm.

The lands owned by Henry C. Buescher consisted of 172.52 acres of farm land of which 132.52 were condemned by the Government. The Court correctly instructed the jury that the measure of damages was the value of the entire farm at the date of the taking, less the value of the forty acre tract immediately after the taking (R. 49). The land-owners' witnesses estimated the value of the land taken, less the present value of the forty acre tract as $39,000 (R. 50), $37,900 (R. 51), $34,400 or $34,600 (R. 53), $35,250 (R. 53), $34,100 (R. 54), $37,900 (R. 56) or an average of $36,164. The Government's witnesses estimated just compensation at $14,000 (R. 62) and $13,500 (R. 72). The jury returned a verdict of $31,250 (R. 78, 79).

The Buescher farm lies about seven miles southwest of Burlington, Iowa. What has been said as to the location of the Foster farm with respect to paved highways, railroads, water and air transportation, is likewise applicable to it (R. 49 and 55).

In the same manner and upon the same theory as in the Foster case, the land-owners offered in evidence the declaration of taking showing that the Secretary of War had "ascertained" just compensation to be $22,450 (R. 57). The evidence was admitted over the Government's objection (R. 57). The propositions of law presented as to the Buescher case are precisely the same as in the Foster case with the exception that in the Buescher case there was no testimony as to the value of the land for other than agricultural purposes.

SPECIFICATION OF ERRORS.

1. The court below erred in holding that the declarations of taking signed by the Secretary of War pursuant to Sec. 258 (a), Title 40, U. S. Code, were inadmissible in evidence as admission against interest.

2. The court below erred in holding that the petitioners should not have been permitted to cross-examine the government's expert witnesses with respect to purchases of real estate made by the government in the vicinity at about the time of the institution of the suit for the purpose of testing the qualifications of such witnesses.

3. The court below erred in holding it to be reversible error to admit the testimony of the witnesses as to increased value of the Foster farm by reason of its natural adaptability for manufacturing purposes.

ARGUMENT.

POINT I.

The Declarations of Taking Were Admissible As an Estimate of One of the Parties As to the Amount Which Should Be Allowed As Just Compensation and Likewise Being a Part of the Pleadings.

The Circuit Court erred in holding that the declarations of taking signed by the Secretary of War pursuant to Sec. 258a, Title 40, U. S. C. A., were inadmissible as admissions against interest, Section 1 of the Act of February 26, 1931 (40 U. S. C. A., Sec. 258a-258e) provides that the petitioner may file in the cause with the petition at any time before judgment a declaration of taking signed by the authority empowered by law to acquire the lands described in the petiton, declaring that said lands are thereby taken for the use of the United States. The Act further provides:

> "Said declaration of taking shall contain or have annexed thereto—* * * (5) a statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken."

The same Act further provides:

> "Upon the filing of said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, * * *"

Thus, in order to permit the acquiring authority to immediately divest the owner of ownership and possession of the premises condemned, Congress required the acquiring authority to file in the cause a written estimate of just compensation and, in addition thereto, to deposit in court the amount of such estimate. If Congress had not intended the declaration of taking or the estimate of just compensation included therein to be used in evidence, the statement of the estimated amount could well have been eliminated and the deposit could have been made in court without the written statement of the estimate of just compensation by the acquiring authority.

For the verb "estimate" we find the definition as set out in Webster's New International Dictionary, Second Edition, Unabridged Edition of 1940, the following:

> "To hold in esteem; to appraise; to fix the worth, value, size, extent, etc., of, especially rough or in a general way; to appraise."

For the noun "estimate" the following definitions are set forth:

> "1. Act of valuing or appraised value.
>
> "2. A judgment or opinion usually implying careful consideration or research.
>
> "3. A judgment made by calculation, especially from incomplete data; rough or approximate calculation.
>
> "4. A statement of the amount for which certain work will be done by one who undertakes to do it."

The general principle to be followed with respect to the admission of evidence in condemnation cases is set out best in Jones on Evidence, 4th Edition, Volume 1, Page 294, Section 168:

> "In condemnation proceedings and proceedings to recover compensation for lands taken or damaged, it is perhaps the majority rule to determine questions as to relevancy liberally and to resolve doubts as to

admissibility in favor of the facts offered in evidence rather than against them. Thus, it is the settled rule of the federal courts that evidence of the highest and most profitable use to which the lands can be put in relevant, even though such use can be made only in connection with other lands, if the possibility of such connection is reasonably sufficient to affect market value and not too remote or speculative.

* * * * * * *

"An examination of the authorities cited generally in this section clearly discloses that the determination of the relevancy of any given collateral fact to the issue of value of land, particularly in condemnation proceedings is very largely a matter of judicial discretion."

Bearing this principle in mind, we come now to the case of *Ramming Real Estate Company* v. *United States*, 122 F. 2d 892. We make reference to the *Ramming* case solely because it is quoted from by the Circuit Court of Appeals in its decision. In that case, the offer of the declaration of taking was made for two purposes; first, to show the date of the taking, and, second, a judicial admission on the part of the Government as to the estimated value that it had placed on the property on the day of taking. The court properly sustained an objection on the ground that it was not a binding admission on the part of the Government. Subsequently, counsel for the landowner changed his position on the appeal and conceded that it was not a judicial admission, but was quasi-judicial and hence admissible. The court held that, having limited the offer to a specific purpose, counsel had waived other grounds of possible admissibility and pointed out that the theory upon which the case was tried in the court below must be adhered to upon appeal. There was, therefore, no definite decision as to whether or not the declaration was admissible for any purpose since counsel had abandoned the only ground that was presented to the lower court.

In the case at bar, the trial court, in instruction No. 8 (R. 19 and 20), gave the jury the following clear and correct instruction:

> "In the Foster case evidence was admitted of a statement made by the acquiring authority, the Secretary of War, Henry L. Stimson, that the amount estimated by the acquiring authority to be the just compensation for the taking of their tract was $35,000.
>
> "And in the Buescher case evidence was admitted of a statement made by the acquiring authority, the Secretary of War, Henry L. Stimson, that the amount estimated by the acquiring authority to be the just compensation for the taking of his tract was $22,450.
>
> "On this you are instructed that you should not consider these statements of the Secretary of War as a judicial determination or as a conclusively binding statement of the Government, but only as a statement by one of the parties to the suit as to what he considered an estimation of just compensation.
>
> "They are elements or items of evidence which you are to consider as having been made by a party to the suit, and you should only consider them in the light of and in connection with all the other facts and circumstances and opinions of the witnesses in aiding you to determine what is the fair and reasonable cash market value of the Foster Farm and the Buescher Farm on the date of the taking."

It has never been the contention of the appellants that the Government was absolutely bound by the declaration of taking made by the Secretary of War and filed in these cases but it is our contention that the declarations of taking were properly submitted to the jury for consideration by that tribunal. This is particularly true because of the fact that the Secretary of War stated in the declaration of taking that he had "ascertained" the amount of just compensation rather than "estimating" as is set out in the statute.

Under the now familiar doctrine of *Erie Railroad Company* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, the court might well have gone considerably further in instructing the jury in view of the decisions of the Iowa Supreme Court. Thus in the case of *Berry* v. *Glynn*, 214 Iowa 635, 243 N. W. 365, the appellant had filed an answer containing material admissions. Thereafter, he amended the answer so as to strike out the admissions. The court said at page 643 of 214 Iowa:

> "A material admission contained in the pleadings of a party may be introduced into evidence by the adverse party, even though the pleader affected afterwards amended his pleading and thereby removed, so far as the issues are concerned, the subject matter admitted into evidence. While it is true that the pleader has a right to amend his pleadings and make corrections, yet the adverse party has the privilege of replying upon admissions made in such original pleading."

It cannot be denied that the declarations of taking were part of the pleading in the case at bar. In fact, the statute under which these proceedings were commenced expressly requires the filing of a declaration of taking. It is clear, therefore, under the Iowa authorities and upon general principles of the law of evidence, that these statements were properly considered by the jury as a part of the facts and circumstances of the case.

POINT II.

The Court Below Erred in Holding That It Was Reversible Error to Permit Cross Examination of the Government's Witnesses As to Prices Voluntarily Paid by the Government for Lands in the Same Vicinity, Such Cross Examination Being for the Purpose of Testing the Qualifications of the Witnesses.

Discussion of this proposition necessarily involves a brief examination of general principles related thereto.

All of the courts of last resort have seemed to find great difficulty in determining the question as to whether or not sales of other real estate may be considered as bearing upon the question of the fair market value of the real estate under condemnation. Many courts hold that the value of sale price of other real estate substantially similar to the real estate under condemnation may be shown as substantive evidence of value. Other courts hold that the sale prices of other real estate, even though similar, are inadmissible for any purpose whatever as substantive evidence. Most of the courts in the second category, however, hold that cross examination of an expert witness may include references to other sales of land in the vicinity but this is admissible not as substantive evidence of the value of the land under condemnation, but solely for the purpose of testing the qualifications of the witness as an expert, and for no other purpose.

The Iowa Supreme Court, in spite of contrary indications in the earlier cases, now definitely adheres to the principle that sales of other real estate in the vicinity, whether made to the condemning agency or to others, may not be shown on direct examination as substantive evidence of the value of the land under examination, but that such other sales are a proper subject of cross examination of an expert witness in order to test his qualifications. Thus, in the case of *Watkins* v. *Wabash R. R. Company,* 137 Iowa 441, 113 N. W. 924, the court said:

> "The principal question presented for our review involves the ruling of the trial court in admitting the testimony of one Leopold Liike, a witness on behalf of the defendant, as to the price at which he had sold his own land, and in giving to the jury an instruction relating to the weight to be given this and other similar testimony. * * * It is to be conceded that, under some circumstances, testimony of this kind is admissible to show the knowledge of the witness and his competency to speak as an expert upon the subject concerning which he is being examined.

> This is especially true where the witness has assumed to express an opinion and is being cross examined for the purpose of testing the weight and value of his testimony. *King* v. *Railroad Company*, 34 Iowa 458; *Winkelmans* v. *Railroad Company*, 62 Iowa 11; *Commins* v. *Railroad Company*, 63 Iowa 397; *Hollingsworth* v. *Railroad Company*, 63 Iowa 443; but the practically universal rule is to the effect that such testimony is not admissible as substantive evidence of the value of the property which is the subject of the controversy."

To the same effect, see the cases of *Hubbell* v. *Des Moines*, 166 Iowa 581, 147 N. W. 908, and *Maxwell* v. *Iowa Highway Commission*, 223 Iowa 159, 271 N. W. 883.

At the trial, both the Government counsel and counsel for the land-owners recognized this principle and both understood that to introduce direct testimony of other sales of real estate in the vicinity would constitute entering a forbidden field. Both sides, however, took advantage of the opportunity to test the qualifications of opposing witnesses by inquiring as to sales of other real estate in the vicinity. It is obvious from a casual reading of the record that the real purpose of such cross examination by the Government's counsel was not to test the qualifications of the witness but rather to lay before the jury the prices which other land in the vicinity had brought at other times. As an example, let us look at the cross examination of the witness Moore by Mr. Webber, the Government's counsel, appearing at R. 29:

> "I am acquainted with the McNeil eighty which lies immediately to the north of this eighty acres of Fosters and our farms joined on the east. * * *
>
> Q. Don't you know, Mr. Moore, on the 27th of October, 1940, that property sold for $10,200, the whole eighty?
>
> A. I knew it was sold but I didn't know exactly what he got for it. * * * I know where the Clarence Hockett farm * * * is located.

Q. Did you know, Mr. Moore, that on March 23, 1938, that 190 acres sold for $17,500?"

Similar questions were propounded to other witnesses as to the price realized from sales of ten different tracts of land. The price was specifically mentioned on at least nineteen different occasions. It will thus be observed that the Government, under the guise of cross examination, was studiously, assiduously and effectively placing before the jury the prices realized from sales of other land not for the purpose of testing the witnesses' qualifications, but rather for the purpose of having the jury consider such sales as substantive evidence of land values. In so doing, we respectfully submit the Government entered into the forbidden field referred to in the opinion of the Circuit Court of Appeals.

In a somewhat similar manner, but to a considerably less extent, counsel for the landowners cross examined the Government's witnesses as to prices paid by the Government within a few days of the date of taking of the lands in question in the case at bar. In this connection, it is all-important to recall the fact that the record is utterly devoid of any testimony, even tending to indicate that such purchases by the Government were not voluntary.

The Circuit Court of Appeals, however, with absolutely nothing in the record to support its opinion, of its own volition, assumed that the form of cross examination adopted by the Government was for the permissible and laudable purpose of testing the qualifications of the witness and for no other purpose. By the same token, it assumed, without basis in the record, that the questions propounded by land-owners' counsel were for the highly immoral purpose of letting the jury know what the Government had paid for other lands in the vicinity at the time when the condemnation was started.

The learned judge who wrote the opinion of the court below seeks to make a distinction between the two situations on the ground that direct testimony of the price paid by the condemnor for other tracts is not admissible. We freely concede that such is the rule in Iowa. Examination of the cases cited by the lower court, however, reveal clearly that no such attempted distinction is warranted. Thus in the case of *Simons* v. *Railway Company*, 128 Iowa 139, at page 150 (103 N. W. 129), the court said:

> "Plaintiff was permitted, over objections of the defendant, to show what the defendant Railway Company had paid to others per acre for rights of way over their land. The tracts were not similarly situated or improved; the railway did not cross them in the same way; and the consequential damages were not and could not have been the same in the several instances; and yet the price paid, considered with reference to the number of acres taken in each case, was offered as a test whereby the jury might fix the price per acre to be paid for plaintiff's land. * * * The overwhelming weight of authority is to the effect that such testimony as to the amounts paid for other tracts is inadmissible (Citing cases)."

The other case relied upon by the Circuit Court of Appeals; namely, *United States ex rel.* v. *Reynolds,* 115 F. 2d 294, falls still farther short of sustaining the distinction which the lower court attempted to make in its opinion. In the Reynolds case, a statutory court of three judges made an award of compensation in which they erroneously took into consideration unsworn statements of amounts paid by the United States for other properties. The case falls far short of holding, as did the Circuit Court of Appeals in this case, that cross examination is permissible where it reveals prices paid by individuals but is not permissible where it reveals prices paid for other lands by the condemning agency.

The error into which the Circuit Court of Appeals fell on this proposition lies in the fact that it recognized that prices by the condemning agency constitute a forbidden field *so far as direct and substantive evidence is concerned* in the state of Iowa but does not recognize that in the state of Iowa substantive evidence of prices paid for any land also constitutes a forbidden field. Inasmuch as neither field may be entered directly, we respectfully submit that it is ridiculous to assume that cross examination limited solely to testing the qualifications of the witness is permissible in one field and not in the other. Indeed, a careful reading of the Iowa authorities referred to in the *Simons case, supra,* indicates that the sole reason for holding that prices paid by the condemnor are inadmissible as substantive evidence is because of the other and greater rule that no substantive evidence of any sales whatever is admissible as bearing upon the value of the land in controversy. If the purpose of the cross examination is to test the qualifications of the witness, then surely it cannot be proper to distinguish between voluntary sales made to the condemning agency and voluntary sales made to others because in either case it is not the fact of the sale that is in issue, nor is the price realized from such sale in issue, nor can it properly be considered by the jury. In either case, the sole permissible purpose of such cross interrogation is to demonstrate whether or not the witness knows of the sales that were actually made in the vicinity and whether his testimony in respect thereto is honest, unbiased and fair.

We do not contend that it was error on the part of the trial court to permit the type of cross examination indulged in by the Government's counsel, but we do strenuously contend that the holding of the Circuit Court of Appeals was erroneous in not permitting to the counsel of the land-owners the same latitude of cross examination as was extended to Government counsel. The Circuit Court is clearly in error when it says in its opinion:

> "Defendants do not seriously contend that the challenged evidence was, under the Iowa rule governing the admissibility of testimony in proceedings of this character, admissible, but they argue that the procedure adopted by the Government counsel justified this method of examination."

The land-owners have never for one moment conceded that the type of cross examination used by both sides was not permissible. They have at all times contended that it was entirely permissible and proper and the record and briefs and arguments in the court below so demonstrate. It may be that the Circuit Court of Appeals was confused because of the references to the doctrine of induced error, but these references were clearly predicated on the proposition that no distinction whatver could be made between the Government's cross examination and the land-owners' cross examination of witnesses. The land-owners' contention at all times has been simply that if the cross examination pursued by the Government was proper, then the cross examination pursued by the land-owners was likewise proper. But let us assume without conceding that the land-owners' cross examination was improper and inadmissible. If such be the case, then it must follow that the Government's type of cross examination was likewise improper and inadmissible for the reason that it was the Government's counsel who first cross examined any witnesses and who established for the purposes of the case the type of cross examination which was to be permitted.

It is well settled by the authorities that counsel are estopped under the familiar doctrine of induced error to complain of a course of conduct which they themselves introduced. Thus, in the early case of *Crawford* v. *Wolf et al.*, 29 Iowa 567, at page 573, the court said:

> "What all these objections may be, as already intimated, assumed by the statement of the facts that the evidence was admitted under a rule adopted by the court under defendant's motion. It is, so to speak,

a rule of defendant's own making; he cannot now be heard to object to it or complain of its evil effects."

The *Crawford* case was followed by the Iowa Court in *Westbrook* v. *M. N. & S. Railway Company,* 115 Iowa 106, at page 109, wherein the court said:

"In *Crawford* v. *Wolf*, 29 Iowa 568, it is held that a party cannot complain of the admission of evidence under a rule adopted by the court claimed to be erroneous, where such rule was adopted at the instance or upon the suggestion of the party complaining."

Similarly, in the case of *Prescott* v. *Merrick,* 46 N. D. 67, 179 N. W. 693, it is said:

"It will be seen that the questions asked by the proponents were in all substantial particulars in the same form as those asked by the contestants upon the trial, and it is a well-established rule *that where one party adopts a form of inquiry for purposes of electing certain facts, he cannot predict error upon the adoption of the same form by the adverse party"* (Italics our own).

It will thus be seen that if consideration is given to the Iowa rule and to the Iowa rule alone, the Circuit Court of Appeals clearly fell into error in its opinion. But it is respectfully submitted that, regardless of whether consideration is given to the rule in Iowa or elsewhere, it likewise appears that the opinion of the court below was not in accordance with the decisions of this Honorable Court nor was it in harmony with decisions of other Circuit Courts of Appeal.

Thus, in the very recent case of the *United States of America* v. *Victor N. Miller et al.,* decided by this Honorable Court, January 4, 1943, and not in the advance sheets at the time of the preparation of this brief, it being No. 78 at the October, 1942, term, this court, speaking through Mr. Justice Roberts, said:

"The respondents also say that, whatever the criterion of value adopted by the federal courts, Congress has adopted the local rule followed in the state where the federal court sits; and they claim that the California rule is settled that fair market value at the date of taking is the standard of value, without elimination of any increment attributable to the action of the taker. We need not determine what is the local law, for the federal statutes upon which reliance is placed require only that, in condemnation proceedings, a federal court shall adopt the forms and methods of procedure afforded by the law of the State in which the court sits. They do not, and could not, affect questions of substantive right—such as the measure of compensation—grounded upon the Constitution of the United States.

"The respondents urge, further, that the reversal by the Circuit Court of Appeals is justified by the District Court's disregard of the practice of the California courts with respect to the production of opinion evidence as to market value, even though it was right as to the elements which must be excluded. They allege that, in California courts, an opinion witness must state his valuation as at the date of taking and the opposing party is at liberty, upon cross examination, to elicit the facts on which the witness relied in arriving at that value. Counsel insist that if the Government was entitled to have the witnesses disregard any increment of value due to the Government's intention to construct the project it could have developed, on cross examination, how far the inclusion of any such element had affected the value stated. We think that probably under California procedure this would have been the better and more appropriate way to develop the basis of the witnesses' opinions. We do not feel, however, that if there was a disregard of the local practice in this aspect the error is substantial or worked injury to the respondents."

Of necessity it must follow from the rule adopted by this court in *U. S.* v. *Miller, supra*, that in cases arising, as does the case at bar, under the provisions of the Federal Constitution and the Federal statutes, the doctrine of

Erie Railroad Company v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, is inapplicable. Indeed, the *Tompkins* case itself specifically excepts "matters governed by the Federal Constitution or by Acts of Congress." Considering, therefore, that questions arising under the Federal Constitution or under the Acts of Congress are governed by Federal law and not by the law of any state, the proposition, nevertheless, remains that the decision of the Circuit Court of Appeals in the case at bar was directly and precisely in conflict with the holdings of other Circuit Courts of Appeal and is particularly in conflict with the case of *Washington Home for Incurables* v. *Hazen*, 63 App. D. C. 185, 70 F. 2d 847. It is respectfully submitted that the *Washington Home* case is precisely analogous with the case at bar so far as its facts are concerned. In that case, as in the case at bar, it appears that some of the land in the area was acquired by purchase while other lands were acquired by condemnation. In neither case is there any showing that the sales made directly to the Government were not voluntary sales in all respects. In the *Washington Home* case the court refers on page 848 of Volume 70, Federal Reporter, 2d Series, to the general rule announced by Lewis in his Work on Eminent Domain, 2d Edition, Section 447, in which the author recognizes the general rule that the price paid by the condemnor for other property is incompetent. The court then goes on to say:

> "Considering the reasons for the rule, as stated by the author, it is clear that there may be exceptional cases where a general rule of this sort would be inapplicable. The exception is expressly recognized by the author in his 3rd Edition, Section 662, as follows:
>
> > 'The propriety of allowing proof of the sales of similar property to that in question, made at or about the time of the taking, is generally approved by the authorities, but such evidence is held to be incompetent in several of the states. In regard to the degree of similarity which must exist, between the property concerning which

such proof is offered and the property taken, and the nearness in respect of time and distance, no general rules can be laid down. These are matters with which the trial judge is usually conversant, and they must rest largely in his discretion.'

"The author then proceeds to discuss leading cases from different states illustrative of the law upon the subject.

"The proper rule and exception is clearly stated by Chief Justice Holmes in *O'Malley* v. *Commonwealth,* 182 Mass. 196, 198, 65 N. E. 30, 31, where the state was changing the grade and altering the street, and the question involved damages to improved property. Evidence was given of a sale of vacant land to the Metropolitan Water Board. The court, upholding the admission of this evidence, said:

'An exception was taken to the sale to the Metropolitan Water Board. If the judge had been of opinion that, as was found in *Cobb* v. *City of Boston,* 112 Mass. 181, 183, the evidence related rather to a settlement of damages occasioned by a taking than a sale, and had excluded the evidence on that ground, very likely we could not have said that he was wrong. *Sawyer* v. *City of Boston,* 144 Mass. 470, 471, 11 N. E. 711. But the exceptions show none of the circumstances—nothing beyond the bare fact of a sale. We cannot say merely because of the name of the purchaser that the sale was not a fair transaction in the market rather than a compulsory settlement. The Board has power to purchase as well as to condemn land.'

"It will be observed that in the above case the purchase was not by the condemning party, but by another party, as in the instant case the government purchasing the site for the use of the Bureau of Standards; but, in the absence of conditions forbidding the admission of such evidence, the rule does not seem to be different where the purchase has been made by the condemning party."

It, therefore, appears that the decision of the Circuit Court of Appeals in the case at bar is directly in conflict with the decision of the Appellate Court of the District of Columbia in cases which are entirely incapable of being distinguished on their facts. It is clear that, if the rule announced by the Appellate Court of the District of Columbia is the correct rule, then, in the case at bar it would have been entirely permissible to introduce direct testimony as to prices voluntarily paid by the United States Government for other similar lands in the vicinity of the land in controversy here and about the time of the condemnation. If this be the rule then the Circuit Court of Appeals for the Eighth Circuit is manifestly wrong and the case must be reversed. If, on the other hand, the Iowa rule is to be considered, it can make no possible difference whether questions are propounded on cross examination of expert witnesses touching upon sales of other lands made to the Government or whether such questions are propounded to such witnesses with respect to sales of other lands to private individuals. In either case, under the Iowa rule as has been abundantly demonstrated by the authorities cited in this brief, the fields touched upon are forbidden fields except for the sole purpose of testing the qualifications of the witness. For the purpose of testing such qualifications it can make no conceivable difference whether the sale inquired about is a voluntary sale to the Government, a voluntary sale to an individual, an involuntary sale to the Government or an involuntary sale to or by an individual. In any event, no matter what the type of sale, the only purpose permissible under the Iowa law is to ascertain the bias, fairness, knowledge, or lack of knowledge on the part of the witness.

Therefore, under either theory, the opinion of the Circuit Court of Appeals of the Eighth Circuit in the case at bar is manifestly wrong and reversal should follow.

POINT III.

The Lower Court Erred in Holding That the Testimony of Naumann and Wischmeier As to Increased Value of the Foster Farm, Because of Its Adaptability for Manufacturing Purposes, Was Inadmissible.

It appears without dispute in the record that the Foster farm is in a location readily accessible to paved highways, to the main line of the Chicago, Burlington & Quincy Railroad, to the Burlington-St. Paul branch of the Rock Island Railroad, to the municipal docks at Burlington for river transportation, and to the Burlington airport. It further appears without dispute that at the time of the condemnation the land was being used for industrial purposes; namely, for an ordnance plant. It is true that the witness Naumann stated as an opinion of cross examination that there was no present probability of the land being used for industrial purposes except for the ordnance plant. The Circuit Court of Appeals erroneously seizes upon this opinion as a ground for holding that the testimony of the witnesses Wischmeier and Naumann was entirely inadmissible. We respectfully submit that, considering the record, the question of the adaptability of the land for manufacturing purposes was for the jury. The very fact that at the moment when condemnation proceedings were instituted the land was being used for manufacturing purposes is of itself evidence that it was reasonably available and adaptable for such uses. In making this statement we do not overlook the rule laid down in *Olson* v. *United States*, 292 U. S. 246, but we submit that with a record showing accessibility to all forms of transportation, with a further showing that the expansion of Burlington, such as it was, was in a westerly direction, that the farm lay a short distance west of Burlington, together with the undisputed fact that the land was actually being used for manufacturing purposes, the situation was not one of speculation or con-

jecture as to the availability of the land as an industrial site.

Furthermore, the witness Naumann, after being qualified as an expert on real estate, was asked:

> "Is the Foster farm so situated as to be available for manufacturing purposes?
> A. Yes" (R. 41).

Another expert witness, Wischmeier, was asked:

> "To what other use would it be adapted as of January 21, this year?
> A. Yes, it could be used for manufacturing purposes—might build a city out there" (R. 45).

In the case of *U. S.* v. *Chandler—Dunbar Water Power Company,* 229 U. S. 53, 57 L. Ed. 1063, the court said at page 77 in 229 U. S.:

> "Although it is not proper to estimate land condemned for public purposes by the public necessities or its worth to the public for such purpose, *it is proper to consider the fact that the property is so situated that it will probably be desired and available for such a purpose*" (Italics added).

Therefore, the jury might well have been permitted to consider that the land was reasonably worth some $5,000 to $5,500 more than its actual value for farm purposes alone. The trial court, however, in an excess of caution, instructed in its Instruction No. 6 as follows:

> "You are not permitted, however, to consider * * * any particular or peculiar specific use for which the government was purchasing it. * * * Neither are you permitted to consider the value of the properties, if they have such a value, for the particular and special use of construction of a shell loading plant by the taker" (R. 18 and 19).

Furthermore, the fact that the jury were not prejudiced in any manner by such testimony is evidenced by

the amount of the verdict which was some $6,000 less than the valuation placed on the farm for manufacturing purposes by either of the witnesses. In any event, no reversible error was committed in permitting the introduction of the testimony and the Circuit Court of Appeals erred in holding that reversible error was committed.

It must also be remembered that as to the Buescher farm there was no testimony whatever as to its availability for manufacturing purposes nor was any increased valuation given by any witness because of such adaptability. This was entirely overlooked by the Circuit Court of Appeals. As will be seen from the record, the Buescher farm lies approximately three miles distant from the Foster farm (instead of adjoining it to the north as it was stated by the Circuit Court) and, so far as the record shows, its best available use was for farming purposes. The Circuit Court of Appeals, in its opinion, however, makes no distinction whatever between the two farms. Even if it had been reversible error to admit the testimony as to the Foster farm (which we deny) there is no imaginable excuse for setting aside the judgment as to the Buescher farm on this ground.

Respectfully submitted,

DON K. WALTER,
Burlington, Iowa,
J. C. PRYOR,
Burlington, Iowa,
JOHN HALE,
Burlington, Iowa,
Attorneys for Petitioners.

UNITED STATES CIRCUIT OF APPEALS

EIGHTH CIRCUIT

NOVEMBER TERM, A.D. 1942.

No. 12,270.

Elizabeth J. O'Donnell and
Edmund A. O'Donnell,
Appellants,
vs.
United States of America,
Appellee.

Appeals from the District Court of the United States for the Eastern District of Missouri.

December 11, 1942.

Mr. Maurice P. Phillips, (Mr. Harry Richards, on the brief) for Appellants.

Mr. Harry C. Blanton, United States Attorney, (Mr. Norman M. Littell, Assistant Attorney General, and Mr. Vernon L. Wilkinson, Attorney, Department of Justice, on the brief) for Appellee.

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Before GARDNER, WOODROUGH and THOMAS, Circuit Judges.

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GARDNER, Circuit Judge, delivered the opinion of the court.

This is a proceeding in condemnation brought by the United States for the purpose of condemning certain real estate belonging to Elizabeth J. O'Donnell and Edmund A. O'Donnell by virtue of the Historic Sites Act 16 U.S.C.A. Sec. 461 - et seq. The proceeding was commenced July 12, 1937. A declaration of taking was filed by the Government on June 15, 1939 and on that date a judgment on the declaration of taking was entered vesting fee simple title in the United States. In the declaration filed the Assistant Secretary of the Interior estimated the sum of $35,125.00 as just compensation for the property taken and upon payment of that amount into Court the Government took possession of the property. Appellants filed exceptions to the commissioners' report fixing the just compensation and upon trial of the exceptions to the commissioners award the jury returned a verdict in favor of appellants in the amount of $37,900.00, upon which judgment was entered. The parties will be referred to as they appeared in the trial court.

Defendants seek reversal of the judgment on substantially the following grounds: (1) The Court erred in refusing to allow the appellants-defendants to introduce in evidence the declaration of taking of the Secretary of the Interior of the United States as an admission against interest; (2) the Verdict of $37,900.00 returned by the jury at the trial of said cause was grossly inadequate and opposed to the weight of the evidence.

Defendants assumed the burden of proof as to the only issue submitted to the jury, the value of the property taken. They called five expert witnesses who fixed the value at $75,000.00, $70,000.00, $60,113.00, $60,000.00, and $70,000.00 respectively. The Government then called five expert witnesses who fixed the value at $28,113.00, $30,000.00, $27,500.00, $27,500.00 and $27,000,00 to $29,000.00, respectively.

On rebuttal defendants called one witness who testified briefly as to matters not here pertinent. At the conclusion of testimony by witnesses the following proceedings were had:

Mr. Richards: I would like at this time to make an offer of proof of the Government's deposit in court for the use of this property owner in the sum of $35,125.00.

The Court: For what purpose, Mr. Richards?

Mr. Richards: As an admission by the Government of fair market value.

Mr. Cooper: To which we object because it is not an admission as it is required to be made.

The Court: The same question has been in other cases.

Mr. Richards: is in this, too, yes.

The Court: And is offered, as I understand it, in the nature of an estoppel, that the Government has, by making a deposit, through the agency making it, asserted the value to be the amount of the deposit.

Mr. Phillips: And as an admission against interest.

Mr. Richards: Not less than that.

The Court: And not less than that. It has been my conclusion, as expressed in other cases, that the agency could not estop the Government asserting here what it understands the fair market value to be in this case. For that reason, the objection is sustained to the offer.

Mr. Phillips: Just so the record may be clear on it, let that original offer now stand as an offer of proof.

The Court: Certainly, yes.

It is now urged that the Court erred in not allowing defendants to introduce in evidence the declaration of taking but it is observed that the declaration of taking was not identified as such nor referred to in the offer of proof. In other words, the declaration was not offered but the defendants offered to prove that the Government had deposited in Court for the use of the defendants the sum of $35,125.00. The question which is here argued was therefore not presented to the lower court and cannot now be reviewed by us. It is noted that the court stated that it was its understanding that the offer was made to prove an estoppel. Counsel in reply to this said: "and an admission against interest". If admissable it was certainly not an estoppel and the offer was not limited to its proof as an admission against interest. The ruling of the court as it was announced at the time was based on the theory that the offer was "in the nature of an estoppel". If this was not the theory upon which it was offered it was incumbent upon counsel at the time to bring the matter sharply to the attention

of the court. But instead counsel in effect said: "Yes, it is offered as an estoppel and as an admission against interest."

We have held that even the declaration was not a judicial admission and, hence, not an estoppel. Ramming Real Estate Co. v The U.S. 122 F. 2nd 892. The mere offer of proof that the Government had deposited this money "for the use of this property owner" without any reference to the declaration accompanying the deposit was meaningless and would simply have been confusing to the jury. The offer was clearly not sufficient to raise the question which defendants now argue. If admissable this testimony would have been an admission that the property taken had a value of $35,125.00. The jury, however, returned a verdict awarding the defendants the sum of $37,900.00 as just compensation for the property taken, a value in excess of the amount stated in the alleged admission. If, therefore, it should be conceded, which it is not, that the proferred testimony was admissable its exclusion could scarcely be said to have been prejudicial. It certainly did not tend to prove that the property was worth more than $35,125.00.

The erroneous exclusion of evidence is not a reversable error unless it is prejudicial to the substantial rights of the party offering it. We cannot see that the admission of this evidence would have benefited defendant's. As has been noted defendant witnesses placed the value of this property at figures ranging from $60,000.00 to $75,000.00. This proferred admission would be evidence of a value much less than that fixed by defendants' witnesses and substantially less than that determined by the jury. Rejection of the evidence was, therefore, not in any event prejudicial.

It is next contended that the verdict returned was grossly inadequate and opposed to the weight of the evidence. The only issue for determination was the amount of compensation due the defendants, and this was dependent upon the value of the property taken. Counsel for defendants ingeniously argue that this proceeding is not a common law action and, hence, on appeal we are not limited to a mere examination of the alleged errors at law that may have been committed by the trial court. We do not deem it necessary to consider the argument in this regard because the record is such that if we were reviewing the facts we could not say that the verdict is grossly inadequate. The jury after hearing all the facts and observing the witnesses who appeared and testified before it, fixed the value at $37,900.00, and it appears that the court which also heard all

of the evidence and observed the witnesses who testified refused to grant a new trial. By whatever rules we should be governed there would seem to be no basis for holding that the amount fixed by the jury as just compensation is grossly inadequate.

The judgment appealed from is, therefore, affirmed.

Endorsed:
Filed:

Jas. J. O'Connor, Clerk